RECORD AND BRIEFS.

No. 16-477

FILED
AUG 29 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,

Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NATIONAL BASKETBALL ASSOCIATION, NATIONAL FOOTBALL LEAGUE, NATIONAL HOCKEY LEAGUE, OFFICE OF THE COMMISSIONER OF BASEBALL, doing business as MAJOR LEAGUE BASEBALL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE PETITIONER

EDWARD A. HARTNETT
Richard J. Hughes Professor of Law
SETON HALL UNIVERSITY SCHOOL OF LAW
One Newark Center
1109 Raymond Boulevard
Newark, New Jersey 07102
(973) 642-8842

RONALD J. RICCIO
Counsel of Record
ELIOTT BERMAN
MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP
1300 Mount Kemble Avenue
Morristown, New Jersey 07962
(973) 993-8100
rriccio@mdmc-law.com

Counsel for Petitioner
New Jersey Thoroughbred Horsemen's Association, Inc.

QUESTION PRESENTED

Does a federal statute that prohibits adjustment or repeal of state-law prohibitions on private conduct impermissibly commandeer the regulatory power of States in contravention of *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997)?

PARTIES TO THE PROCEEDING

Petitioner New Jersey Thoroughbred Horsemen's Association, Inc. ("NJTHA") was a defendant in the district court and an appellant below.

Respondents National Collegiate Athletic Association ("NCAA"), National Basketball Association ("NBA"), National Football League ("NFL"), National Hockey League ("NHL") and Office of the Commissioner of Baseball ("MLB") (collectively, the "Leagues") were plaintiffs and appellees below.

Christopher J. Christie, Governor of the State of New Jersey, David L. Rebuck, Director of the New Jersey Division of Gaming Enforcement, and Frank Zanzucki, Executive Director of the New Jersey Racing Commission, were defendants and appellants below (the "State Defendants").

Stephen M. Sweeney, President of the New Jersey Senate, and Vincent Prieto, Speaker of the New Jersey General Assembly, were intervenors-defendants in the district court and appellants below (the "State Legislators").

The State Defendants and the State Legislators are filing a separate brief in Docket No. 16-476, which has been consolidated with this case.

The New Jersey Sports and Exposition Authority was a defendant in the district court but did not participate in the appeal.

The United States of America participated as an *amicus curiae* in the proceedings below.

RULE 29.6 DISCLOSURE

No parent or publicly owned corporation owns 10% or more of the stock in New Jersey Thoroughbred Horsemen's Association, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 DISCLOSURE iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

BRIEF FOR THE PETITIONER 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 6

A. Description Of The NJTHA 7

B. The Leagues' Ownership Of And Support For Fantasy Sports Wagering Platforms 9

C. New Jersey's Criminal Laws Prohibiting Sports Gambling 12

D. The District Court's Injunction 13

SUMMARY OF ARGUMENT 14

ARGUMENT 18

I. Under Its Most Natural Construction PASPA Is Unconstitutional And New Jersey's 2014 Repealer Is Valid 18

TABLE OF CONTENTS – Continued

Page

A. The Text And Structure Of The Constitution Demonstrate That Congress Has Never Had The Power To Regulate State Governments' Regulation Of Interstate Commerce 18

B. Structural Federalism Protects Liberty, Preserves The Autonomy Of States To Guard Against Abuses By The National Government, And Promotes Political Accountability 22

C. A Congressional Command Dictating How A State Must Regulate The Conduct Of Its Citizens Is Unconstitutional, Regardless Of How The Command Is Phrased 26

D. As Most Naturally Construed, PASPA Directly Commands States To Prohibit Sports Betting And Is, Therefore, Unconstitutional 31

E. The District Court's Injunction Confirms How, In Practice, PASPA Unconstitutionally Commandeers State Legislative And Executive Sovereign Functions 35

F. PASPA Significantly Reduces Congress's Political Accountability 38

G. PASPA Abridges Liberty 41

TABLE OF CONTENTS – Continued

Page

H. The En Banc Majority's Construction Of PASPA Is Unreasonable And, In Any Event, Doesn't Save PASPA's Constitutionality 42

II. PASPA May Be Susceptible Of A Reasonable Construction That Does Not Prohibit New Jersey's 2014 Repealer And Avoids The Need To Decide The Constitutional Question 49

CONCLUSION 57

TABLE OF AUTHORITIES

Page

CASES

Alden v. *Maine*, 527 U.S. 706 (1999) 23, 40

Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 51

Arizona Free Enter. Club's Freedom Club PAC v. *Bennett*, 564 U.S. 721 (2011) 45

Armstrong v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015) 21

Ashwander v. *Tennessee Valley Auth.*, 297 U.S. 288 (1936) 49, 50

Bailey v. *Alabama*, 219 U.S. 219 (1911) 27

Bond v. *United States*, 564 U.S. 211 (2011) 23

Bond v. *United States*, 134 S. Ct. 2077 (2014) 49, 51, 52, 53

Conant v. *Walters*, 309 F.3d 629 (9th Cir. 2002) 27

Coyle v. *Smith*, 221 U.S. 559 (1911) 16, 29

Dennis v. *Higgins*, 498 U.S. 439 (1991) 21

Edward J. DeBartolo Corp. v. *Florida Gulf Coast Bldg.*, 485 U.S. 568 (1988) 50

Ex parte Garland, 71 U.S. 333 (1866) 25

F.E.R.C. v. *Mississippi*, 456 U.S. 742 (1982) 21, 30

Feltner v. *Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998) 51

Garcia v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) 17, 32, 33

TABLE OF AUTHORITIES – Continued

Page

Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 22, 51

Herrera v. *Collins*, 506 U.S. 390 (1993) 25

Hodel v. *Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981).....30

Linda R.S. v. *Richard D.*, 410 U.S. 614 (1973).....39

M'Culloch v. *Maryland*, 17 U.S. 316 (1819).....20

Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992).....31

Nat'l Fed'n of Indep. Bus. v. *Sebelius*, 567 U.S. 519 (2012).....*passim*

New York v. *United States*, 505 U.S. 144 (1992)....*passim*

Printz v. *United States*, 521 U.S. 898 (1997).....*passim*

Reno v. *Condon*, 528 U.S. 141 (2000).....31

South Carolina v. *Baker*, 485 U.S. 505 (1988).....31

U.S. Term Limits, Inc. v. *Thornton*, 514 U.S. 779 (1995).....21

United States v. *Bass*, 404 U.S. 336 (1971).....51, 52, 55

United States v. *Lopez*, 514 U.S. 549 (1995).....24, 33

United States v. *Williams*, 553 U.S. 285 (2008).....54

United States ex rel. Attorney Gen. v. *Delaware & Hudson Co.*, 213 U.S. 366 (1909).....51

CONSTITUTIONAL PROVISIONS

U.S. Const. Preamble 20

U.S. Const. Art. I, § 8 .....2, 18, 19

TABLE OF AUTHORITIES – Continued

Page

U.S. Const. Art. VI 2

U.S. Const. Art. VII 20

U.S. Const. Amend. X ..... *passim*

FEDERAL STATUTES

28 U.S.C. 1254(1) 1

28 U.S.C. 1291 2

28 U.S.C. 1331 2

28 U.S.C. 3701 *et seq.* ..... *passim*

31 U.S.C. 5361 *et seq.* 10

STATE STATUTES

N.J. P.L. 2011, c. 231 4

N.J. P.L. 2014, c. 62 ..... *passim*

N.J. Stat. Ann. § 2A:40-1 *et seq.* 37

N.J. Stat. Ann. § 2C:37-1 *et seq.* 12, 13, 36

N.J. Stat. Ann. § 2C:43-6(a)(3) 13

OTHER AUTHORITIES

Articles of Confederation, art. VIII 19

S. Rep. No. 248, 102nd Cong., 1st Sess. (1991) 11, 33, 38

138 Cong. Rec. S7274-02, 1992 WL 116822 (daily ed. June 2, 1992) 34

TABLE OF AUTHORITIES – Continued

Page

138 Cong. Rec. S17434-01, 1992 WL 275344 (daily ed. Oct. 7, 1992) 34

The Federalist Papers (Clinton Rossiter ed. 1961) 20, 23

The Records of the Federal Convention of 1787 (Max Farrand ed., rev. ed. 1937) 19, 20

Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425 (1987) 23

Paul Brest, Sanford Levinson, Jack M. Balkin, Akhil Reed Amar & Reva B. Siegel, *Processes of Constitutional Decisionmaking* (2015) 24

Erwin Chemerinsky *et al.*, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74 (2015) 28

Allison H. Eid, *Preemption and the Federalism Five*, 37 Rutgers L.J. 1 (2005) 21

Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) 47

Michael Klarman, *The Framers' Coup: The Making of the United States Constitution* 148 (2016) 18

James Madison, *Notes on the Constitutional Convention* (May 29, 1787) 19, 20

Robert A. Mikos, *Indemnification As an Alternative to Nullification*, 76 Mont. L. Rev. 57 (2015) 25

Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225 (2000) 21

TABLE OF AUTHORITIES – Continued

Page

Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012).....49

Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. Rev. 893 (2000).....25

American Heritage Dictionary of the English Language (4th ed. 2000).....31

Black's Law Dictionary (6th ed. 1990).....31, 32

Webster's New World Dictionary (3d college ed., 1993).....31

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The majority and dissenting opinions of the en banc court of appeals (Pet. App. 1a-46a[1]) are reported at 832 F.3d 389. The majority and dissenting opinions of the three-judge panel of the court of appeals (Pet. App. 49a-75a) is reported at 799 F.3d 259. The opinion of the district court (Pet. App. 76a-113a) granting summary judgment to the Leagues is reported at 61 F.Supp.3d 488. The majority and dissenting opinions of the three-judge panel of the court of appeals (Pet. App. 117a-200a) in an earlier round of litigation involving these issues and parties is reported at 730 F.3d 208 (*"Christie I"*).

JURISDICTION

The court of appeals entered its judgment and opinion on August 9, 2016 after en banc rehearing. An amended opinion was issued on August 11, 2016 to reflect that Judge Restrepo joined Judge Fuentes's dissent. That amendment did not affect the original filing date of the judgment on August 9, 2016. See Pet. App. 47a-48a. The petition for a writ of certiorari was filed on September 29, 2016, and granted on June 27, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1). Jurisdiction in the district court was based on

[1] References to "Pet. App." are to the Appendix of the Petition for a Writ of Certiorari filed by the State Defendants and the State Legislators in Docket No. 16-476, which has been consolidated with this case.

28 U.S.C. 1331 and jurisdiction in the court of appeals was based on 28 U.S.C. 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides:

> The Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.

U.S. Const. Art. I, § 8, Cl. 3.

The Supremacy Clause of the United States Constitution provides:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, Cl. 2.

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the

States, are reserved to the States respectively, or to the people.

U.S. Const. Amend. X.

The most relevant provisions of the Professional and Amateur Sports Protection Act ("PASPA") – whose formal title is "An Act To prohibit sports gambling under State law, and for other purposes," 106 Stat. 4227 (Oct. 28, 1992) – provide in pertinent part:

28 U.S.C. 3702:

It shall be unlawful for –

(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or

(2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,

a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. 3703:

A civil action to enjoin a violation of section 3702 may be commenced in an appropriate district court of the United States by the Attorney General of the United States, or by a professional sports organization or amateur

> sports organization whose competitive game is alleged to be the basis of such violation.

The full text of PASPA, 28 U.S.C. 3701 *et seq.*, is reproduced at Pet. App. 204a-207a.

The most relevant provisions of P.L. 2014, c. 62 ("2014 Repealer") provide in pertinent part:

CHAPTER 62

AN ACT partially repealing the prohibitions, permits, licenses, and authorizations concerning wagers on professional, collegiate, or amateur sport contests or athletic events, deleting a portion of P.L. 1977, c. 110, and repealing sections 1 through 6 of P.L. 2011, c. 231.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

C.5:12A-7 Certain provisions repealed relative to wagers on certain sports contests, athletic events.

1. The provisions of chapter 37 of Title 2C of the New Jersey Statutes, chapter 40 of Title 2A of the New Jersey Statutes, chapter 5 of Title 5 of the Revised Statutes, and P.L. 1977, c. 110 (C.5:12-1 *et seq.*), as amended and supplemented, and any rules and regulations that may require or authorize any State agency to license, authorize, permit or otherwise take action to allow any person to engage in the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event, or that prohibit participation in or operation of a pool that accepts such wagers, are repealed to the extent they apply or

may be construed to apply at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, to the placement and acceptance of wagers on professional, collegiate, or amateur sport contests or athletic events by persons 21 years of age or older situated at such location or to the operation of a wagering pool that accepts such wagers from persons 21 years of age or older situated at such location, provided that the operator of the casino, gambling house, or running or harness horse racetrack consents to the wagering or operation.

As used in this act, P.L. 2014, c. 62 (C.5:12A-7 *et al.*):

"collegiate sport contest or athletic event" shall not include a collegiate sport contest or collegiate athletic event that takes place in New Jersey or a sport contest or athletic event in which any New Jersey college team participates regardless of where the event takes place; and

"running or harness horse racetrack" means the physical facility where a horse race meeting with parimutuel wagering is conducted and includes any former racetrack where such a meeting was conducted within 15 years prior to the effective date of this act, excluding premises other than those where the racecourse itself was located.

C.5:12A-8 Construction of act.

2. The provisions of this act P.L. 2014, c. 62 (C.5:12A-7 *et al.*), are not intended and shall not be construed as causing the State to sponsor, operate, advertise, promote, license, or authorize by law or compact the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event but, rather, are intended and shall be construed to repeal State laws and regulations prohibiting and regulating the placement and acceptance, at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, of wagers on professional, collegiate, or amateur sport contests or athletic events by persons 21 years of age or older situated at such locations.

The full text of New Jersey's 2014 Repealer is reproduced at Pet. App. 218a-222a.

STATEMENT OF THE CASE

The factual background and procedural history as set forth in the Statement of the Case of the State Defendants and State Legislators in their Brief for Petitioners in Docket No. 16-476 is incorporated herein by reference. To that Statement of the Case, the NJTHA respectfully adds the following facts specific to the NJTHA.

A. Description Of The NJTHA

The NJTHA has more than 3,000 members, consisting of thoroughbred horse owners and horse trainers from around the world. J.A. 217 ¶23. The NJTHA is also the licensed operator and permit holder of Monmouth Park Racetrack, a thoroughbred racetrack located in Oceanport, New Jersey ("Monmouth Park"). *Id.* ¶24. Monmouth Park is one of the venues at which the 2014 Repealer removes sports gambling prohibitions. See Pet. App. 219a-220a § 1.

Monmouth Park is an integral part of all aspects of the equine industry in New Jersey. J.A. 218 ¶30. If Monmouth Park is forced to close it will mean not only the death of the thoroughbred racing industry in New Jersey, but, also, will irreparably damage New Jersey's equine industry. J.A. 219 ¶¶31, 34.

Wagering on New Jersey thoroughbred and standardbred horse races in New Jersey has waned in recent years resulting in the loss of jobs as well as causing economic distress to Monmouth Park and the entire equine industry in New Jersey. J.A. 219 ¶32. The NJTHA believes that sports betting is an essential component of the NJTHA's overall plan to make Monmouth Park an economically self-sustaining thoroughbred racetrack better able to compete with racetracks in surrounding States that are bolstered by casino revenues. *Id.* ¶33.

The New Jersey equine industry is critical to New Jersey's economy and the preservation of open spaces in New Jersey. J.A. 219 ¶34. In a 2009 Report, prepared

by Karyn Malinowski, Ph.D. of the Rutgers Equine Science Center, it was concluded that if racing-related and breeding farms in New Jersey were to cease operations it would have a $780 million negative annual impact, put 7,000 jobs in danger, eliminate $110 million in tax revenues, and leave over 163,000 acres of open space vulnerable to future development. *Ibid.*[2]

PASPA's exemption in favor of four (4) States (especially Nevada and neighboring Delaware) from its prohibition against state authorized by law sports wagering creates competitive disadvantages for New Jersey. J.A. 219-220 ¶35. Specifically, this exemption has combined with other factors to put the New Jersey equine industry, and Monmouth Park in particular, at

---

[2] The New Jersey equine industry, in general, and the New Jersey horse racing industry, in particular, have continued to struggle mightily in recent years. See, *e.g.*, Karyn Malinowski, Ph.D. and Paul D. Gottlieb, Ph.D., *2014 State of the New Jersey Horse Racing Industry Report*, Rutgers Equine Science Center, at 2 (2014), http://www.bloodhorse.com/pdf/2014NJHealthOfHorseRacingReport.pdf ("indicators of the health and well-being of the horse racing industry suggest that the industry is struggling in spite of efforts of racetrack management and organizations representing horse owners and breeders"); *id.* at 3 ("The installation of casino gaming and sports betting at New Jersey racetracks would be a relatively quick and easy way to slow down these trends, to New Jersey's advantage."); *id.* at 8 ("live handle at the racetracks *** has seen a 35 percent decrease since 2010"); *id.* at 17 ("Horse farms continue to sell disproportionately and one can see that the trend of preserving equine-related properties in New Jersey is decreasing.").

such a severe disadvantage that their economic viability has been and continues to be seriously damaged. *Ibid.*

The NJTHA believes that the only revenue stream that can save Monmouth Park at the present time is revenue from sports betting. J.A. 225 ¶5. In anticipation of being able to offer sports betting at Monmouth Park, the NJTHA entered into an agreement with the leading sports betting company in the world, William Hill. *Id.* ¶6; J.A. 229.

Monmouth Park, through the NJTHA, is the founding member of a private regulatory body called The Independent Sports Wagering Association ("TISWA"). J.A. 226 ¶7; J.A. 148-152. TISWA is designed to provide integrity and protect the public with respect to sports betting. J.A. 226 ¶7.

As a result of the court of appeals' en banc judgment and affirmance of the district court's injunction, Monmouth Park estimates that it is losing over one million dollars every week because of its inability to conduct sports betting. J.A. 236 ¶5; J.A. 238.

B. The Leagues' Ownership Of And Support For Fantasy Sports Wagering Platforms

While Monmouth Park and the New Jersey equine industry suffer because Monmouth Park is prohibited from conducting sports wagering, the Leagues have been profiting from fantasy sports betting ("Fantasy"). Fantasy, and especially daily fantasy sports betting

("DFS"), involves betting on the performances of players in the Leagues' games as well as non-Leagues' games. The two industry leaders in Fantasy and DFS, FanDuel and DraftKings, processed a combined $3 billion in fees in 2015. See Don Van Natta, Jr., *Welcome to the Big Time*, Outside the Lines and ESPN Magazine (Aug. 24, 2016), http://www.espn.com/espn/feature/story/_/id/17374929/otl-investigates-implosion-daily-fantasy-sports-leaders-draftkings-fanduel.

PASPA's provisions apply to Fantasy and DFS. Under Section 3702 of PASPA: "It shall be unlawful for a governmental entity to * * * license, or authorize by law * * * [a] betting, gambling, or wagering scheme based * * * on one or more competitive games in which amateur or professional athletes participate * * * *or on one or more performances of such athletes in such games*) (emphasis added).[3] As set forth in the Senate Report accompanying PASPA, "[t]he prohibition of section 3702 applies regardless of whether the scheme is based on chance or skill, or on a combination thereof. Moreover, the prohibition is intended to be broad enough to include all schemes involving an actual

[3] Although the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) (31 U.S.C. 5361 *et seq.*, contains an exclusion for fantasy sports (under certain circumstances) from the prohibitions thereunder (31 U.S.C. 5362(1)(E)(ix)), the UIGEA explicitly states (31 U.S.C. 5361(b)) that nothing contained therein has any effect on any state or federal law prohibiting, permitting or regulating gambling. Thus, the UIGEA provides no immunity to suits under other laws, such as PASPA.

game or games, or an actual performance or performances therein." S. Rep. No. 248, 102nd Cong., 1st Sess. 9 (1991).

Despite the fact that PASPA makes it "unlawful" for States to "authorize by law" betting on the "performances of such athletes" in the Leagues' games, the Leagues have done nothing to stop the spread of Fantasy or DFS wagering.[4] To the contrary, some Leagues own equity stakes in Fantasy and DFS companies such as FanDuel and DraftKings. For the Leagues, Fantasy and DFS is a burgeoning and profitable business that, apparently, they do not see as a threat to the integrity of their games. See Dustin Gouker, *If New Jersey Really Wants to Challenge the Sports Betting Ban, Daily Fantasy Sports is the Answer*, Legal Sports Report (Aug. 30, 2016), http://www.legalsportsreport.com/11255/nj-sports-betting-legal-challenge-via-dfs/ ("There's a reason why the leagues won't challenge the DFS laws. Three of them (NBA, NHL, Major League Baseball) have equity in either DraftKings or FanDuel. Nearly

---

[4] There are currently 16 States that have laws authorizing DFS wagering on athletic performances (Arkansas, Colorado, Delaware, Indiana, Kansas, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, New York, Tennessee, Vermont, and Virginia) and six more States (Illinois, Michigan, North Carolina, Ohio, Pennsylvania, and Washington) have introduced legislation in this area. See Legislative Tracker: Daily Fantasy Sports, Sports Betting, http://www.legalsportsreport.com/dfs-bill-tracker/ (last visited Aug. 29, 2017). See also Dustin Gouker, *New Jersey Gov. Christie Signs Fantasy Sports Bill; 16th State to Enact Law for DFS*, Legal Sports Report (Aug. 24, 2017), https://www.legalsportsreport.com/15238/new-jersey-fantasy-sports-law/.

every NFL team also has a deal with one of the two DFS operators.").[5]

C. New Jersey's Criminal Laws Prohibiting Sports Gambling

The 2014 Repealer repeals all laws, rules, and regulations that prohibit sports betting at Atlantic City casinos, current racetracks, and former racetrack racecourses. Pet. App. 219a-220a.[6] Chapter 37 of Title 2C of the New Jersey Statutes ("Chapter 37") contains New Jersey's criminal gambling prohibitions. N.J. Stat. Ann. § 2C:37-1 *et seq.*

Under Section 2(b) of Chapter 37, a person who "engag[es] in bookmaking[7] to the extent he receives or

---

[5] Even the NCAA is involved in Fantasy and DFS. "The Pac-12 Network and Big Ten Network, which are fully or jointly owned by the conferences and their universities, still air daily fantasy ads, although not ones that promote college games." Marc Tracy, *NCAA Distances Itself from Daily Fantasy Websites*, New York Times (Oct. 20, 2015), http://www.nytimes.com/2015/10/21/sports/ncaa-distances-itself-from-daily-fantasy-websites.html?_r=0. See generally J.A. 338-340, 343-350.

[6] The 2014 Repealer applies to "racecourse" "premises" of any "former racetrack" in New Jersey. Pet. App. 220a. There are two "former" racetracks in New Jersey – Garden State Park ("GSP") and, as of January 2015, Atlantic City Racecourse. Neither of these "former" racetracks holds a gambling license. The site of the former GSP "racecourse" is now the site of a private shopping mall where businesses such as Home Depot, Bed Bath & Beyond, Best Buy, and Barnes & Noble are located. See http://marketplaceatgardenstatepark.com/.

[7] Chapter 37 defines "bookmaking" as "advancing gambling activity by unlawfully accepting bets from members of the public

accepts in one day more than five bets totaling more than $1,000 * * * is guilty of a crime of the third degree and * * * shall be subject to a fine of not more than $35,000 and any other appropriate disposition authorized by N.J.S.2C:43-2b." N.J. Stat. Ann. § 2C:37-2(b). A person convicted of a crime of the third degree may be sentenced to imprisonment for a term between three and five years. N.J. Stat. Ann. § 2C:43-6(a)(3).

D. The District Court's Injunction

On October 20, 2014, the Leagues filed a complaint seeking temporary restraints and a preliminary injunction against the NJTHA as well as the State Defendants. Pet. App. 86a-87a. On October 24, 2014, the district court granted the Leagues' application for a temporary restraining order ("TRO"). *Id.* at 87a. The TRO restrained the NJTHA from conducting sports wagering at Monmouth Park. J.A. 260. The district court required the Leagues, pursuant to Rule 65(c) of the Federal Rules of Civil Procedure, to post a security bond in the amount of $1.7 million. Pet. App. 87a; see also J.A. 236 ¶5; J.A. 238.[8]

In opposing the Leagues' request for an injunction the NJTHA argued, *inter alia*, that the Leagues had

---

upon the outcome of future contingent events as a business." N.J. Stat. Ann. § 2C:37-1(g).

[8] To allow for additional briefing, the district court extended the TRO for an additional fourteen days, until November 21, 2014, and ordered the Leagues to post an additional bond in the amount of $1.7 million, for a total bond of $3.4 million. Pet. App. 87a n.6; J.A. 262.

"unclean hands" based, in part, on the Leagues' significant involvement and equity interest in an activity prohibited by PASPA – state "authorize[d] by law" Fantasy and DFS wagering. The NJTHA contended that if sports betting on the Leagues' games allegedly threatened the integrity of the Leagues' games then, *a fortiori*, Fantasy and DFS betting on the performances of the Leagues' players in the Leagues' games would threaten the integrity of the Leagues' games. J.A. 338-340. The district court prevented the NJTHA from taking any discovery on the Leagues' "unclean hands" and, instead, consolidated the Leagues' request for a preliminary injunction with a decision on the merits. Pet. App. 88a; J.A. 34-35 at ECF Nos. 50, 56.

On November 21, 2014, the district court held the 2014 Repealer was prohibited by PASPA and, thus, invalid. It enjoined the State Defendants "from violating PASPA through giving operation or effect to the 2014 [Repealer] in its entirety." Pet. App. 113a; see also J.A. 383. The district court did not enjoin the NTJHA, writing that "it is unnecessary for the Court to determine the validity of the NJTHA's assertion of unclean hands" because "no injunction is being entered against the NJTHA." Pet. App. 92a n.7.

SUMMARY OF ARGUMENT

There are two alternative ways to decide this case. First, if PASPA is given its most natural construction, it violates the Tenth Amendment and principles of

structural federalism because it commands States to govern according to Congress's instructions. Second, if PASPA is susceptible of a reasonable avoidance construction then it may be construed to allow States to repeal, in whole or in part, sports betting prohibitions. Either way, New Jersey's 2014 Repealer is valid.

PASPA makes it "unlawful" for States to "license, or authorize by law" a "betting, gambling, or wagering scheme based, directly or indirectly * * * , on one or more competitive games in which amateur or professional athletes participate * * * or on one or more performances of such athletes in such games." 28 U.S.C. 3702. PASPA treats the sovereignty of the States unequally by exempting four States (at least partially) from its prohibitions. The exempt States are Nevada, Oregon, Delaware, and Montana. See 28 U.S.C. 3704.

PASPA grants enforcement authority to both the "Attorney General of the United States" or "a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation." Enforcement of PASPA is accomplished by means of an injunction from "an appropriate district court of the United States." 28 U.S.C. 3703. In this case it is the Leagues, not the Attorney General, that are enforcing PASPA.

1. Giving PASPA its most natural construction, it is unconstitutional. While Congress has the power to regulate interstate commerce, Congress has *never* had the power to regulate the State's regulation of

interstate commerce. By creating two sovereign governments, the Constitution gives Congress limited enumerated powers to regulate the people directly, but has not empowered Congress to compel the States or state officials to regulate the people. *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519 (2012); *Printz* v. *United States*, 521 U.S. 898 (1997); *New York* v. *United States*, 505 U.S. 144 (1992). The "Constitution has *never* been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*, 505 U.S. at 162 (emphasis added) (citing *Coyle* v. *Smith*, 221 U.S. 559 (1911)). Nor may Congress indirectly coerce "a State to adopt a federal regulatory system as its own." *Sebelius*, 567 U.S. at 578.

The structural federalism embodied in the Constitution protects liberty, preserves the autonomy of the States to guard against abuses by the National Government, and promotes political accountability. It applies whether Congress commands the States to enact new laws or maintain existing laws. It applies whether Congress uses the language of command or the language of prohibition. It applies whether Congress attempts to prevent the States from repealing all or any part of a state law prohibition of private conduct. A congressional command is a command, regardless of its form or phraseology.

The States have reserved sovereign powers under the Tenth Amendment to decide for themselves what they choose not to prohibit. New Jersey acted well within its Tenth Amendment sovereign rights in 2014

by repealing its laws prohibiting sports gambling at certain venues – casinos, current racetracks, and former racetrack racecourses.

PASPA is an unconstitutional anachronism. It was conceived, debated, and drafted during a brief era, marked by this Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). *Garcia* left to the political process the protection of federalism and state sovereign rights under the Tenth Amendment. Because PASPA commands New Jersey to maintain an anti-sports betting body of law, it violates the Tenth Amendment and structural federalism.

2. Although the most natural reading of the text of PASPA is that it commandeers the States, this Court may be able to avoid deciding whether PASPA is constitutional or not. PASPA may be susceptible of a reasonable construction that would permit a State to repeal any part of a state law prohibition against sports gambling. PASPA only bars States from authorizing sports gambling "by law." If a State has repealed any part of its sports gambling prohibition, there is no applicable state "law" authorizing sports gambling. In that case, the freedom to engage in sports gambling would derive not from a state "law" but from the inherent right of the people to do that which is not prohibited.

Whether PASPA is unconstitutional under its most natural construction or PASPA is given an avoidance construction that allows States to repeal their

sports betting prohibitions, in whole or in part, New Jersey's 2014 Repealer is valid.

ARGUMENT

I. Under Its Most Natural Construction PASPA Is Unconstitutional And New Jersey's 2014 Repealer Is Valid.

A. The Text And Structure Of The Constitution Demonstrate That Congress Has Never Had The Power To Regulate State Governments' Regulation Of Interstate Commerce.

The Commerce Clause provides that Congress "shall have power * * * to regulate commerce * * * among the several states." U.S. Const. Art. I, § 8. By its terms, the Commerce Clause "authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *New York* v. *United States*, 505 U.S. 144, 166 (1992).

This distinction is mirrored in other enumerated powers given to Congress in Article I,[9] and reflects the

[9] Congress, for example, has the "power to lay and collect taxes," but not the power to requisition funds from the States and command them to impose taxes. U.S. Const. Art. I, § 8. See, *e.g.*, Michael Klarman, *The Framers' Coup: The Making of the United States Constitution* 148 (2016) ("The consensus among delegates for empowering Congress to levy taxes – rather than simply requisition funds – which would obviate the need for a power to coerce states, was so strong that little discussion was devoted to the

overall structure of the Constitution. The National Government is empowered to regulate the people directly, but not indirectly through the States.

This was no accident. The Framers knew that the Articles of Confederation authorized Congress to make demands on the States. They also knew that the Articles provided no mechanism to force the States to comply with these demands. See, *e.g.*, Articles of Confederation, art. VIII. Solving this problem was crucial to the success of the Nation.

One solution that was considered, but then firmly rejected, was to give the National Government coercive means of enforcing its demands on the States.[10]

---

subject."). Similarly, Congress has the power to "provide for the common defense and general welfare of the United States," U.S. Const. Art. I, § 8, but no power to command the States to spend state money as Congress demands. See, *e.g.*, *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 576-77 (2012) (Roberts, C.J., joined by Breyer and Kagan, JJ.) (noting that because Spending Clause legislation is in the nature of a contract, the "legitimacy of Congress's exercise of the spending power" depends on whether the State voluntarily and knowingly accepts the terms of the contract) (citations omitted).

[10] Under the original Virginia Plan, the National Government would have been given the power "to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof." James Madison, *Notes on the Constitutional Convention* (May 29, 1787), *in* 1 *The Records of the Federal Convention of 1787*, at 21 (Max Farrand ed., rev. ed. 1937). But further discussion led Madison to realize that such a coercive constitutional provision risked civil war. The provision was postponed without dissent. *Id.* at 54 (May 31, 1787). The New Jersey Plan had a similar provision, *id.* at 245 (June 15, 1787), which Hamilton criticized as one that would not only lead to civil war, but to foreign intervention and dissolution of the Union. *Id.* at 285

Madison summarized the rejection of this idea at the Constitutional Convention: "The practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands." James Madison, *Notes on the Constitutional Convention* (July 14, 1787), *in* 2 *The Records of the Federal Convention of 1787*, at 9 (Max Farrand ed., rev. ed. 1937).

Instead, the Framers decided the Constitution should confer "upon Congress the power to regulate individuals, not States." *New York* v. *United States*, 505 U.S. 144, 166 (1992). This decision was profound, for it meant that the Constitution had to be made in the name of the people rather than the States, and had to be ratified by the people, assembled in convention, rather than by the state legislatures. U.S. Const. Preamble; U.S. Const. Art. VII.[11] The Constitution thus "created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set

---

(June 18, 1787). See also The Federalist No. 20, at 138 (James Madison and Alexander Hamilton) (Clinton Rossiter ed. 1961) (stating that "a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity").

[11] As a result, "[t]he government of the Union * * * is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, *and are to be exercised directly on them*." *M'Culloch* v. *Maryland*, 17 U.S. 316, 404-405 (1819) (emphasis added).

of mutual rights and obligations to the people who sustain it and are governed by it." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838 (1995).

A nation in which two sovereign governments are both empowered to operate directly on the people needs a rule of priority to resolve conflicts between the two sets of laws. The traditional default rule would have been that the statute later-in-time prevailed. See Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 237 (2000) (citing authorities from Blackstone to Federalist 78). That was unacceptable because it would have failed to overcome the vices of the Articles – at least absent a power in the National Government to veto state legislation, a power the Framers rejected. See *F.E.R.C.* v. *Mississippi*, 456 U.S. 742, 794 (1982) (O'Connor, J., dissenting). Instead, they adopted the Supremacy Clause as a "rule of decision" that "instructs courts what to do when state and federal law clash." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015).

The Supremacy Clause is "not a source of any federal rights." *Dennis* v. *Higgins*, 498 U.S. 439, 450 (1991). Nor is it an enumerated source of congressional power. See Allison H. Eid, *Preemption and the Federalism Five*, 37 Rutgers L.J. 1, 6-8 (2005) (Supremacy Clause has "no substantive component" and is not a power or means of exercising congressional power). It's merely a rule of priority. The Supremacy Clause in no way alters the fundamental framework that requires the National Government to govern the people directly

as opposed to commanding the States to regulate the people in accordance with Congress's edicts.

The Constitution the Framers wrote *never* gave Congress power to "compel the States to enact or administer a federal regulatory program." *New York* v. *United States*, 505 U.S. 144, 188 (1992). "[T]he Constitution has *never* been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *Id.* at 162 (emphasis added). This "is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 578 (2012). In short, while Congress has the power to regulate commerce directly, it has no constitutional authority to require the States to regulate commerce. The choice to decline to prohibit conduct under state law is one of the powers "reserved to the States respectively" by the Tenth Amendment.

B. Structural Federalism Protects Liberty, Preserves The Autonomy Of States To Guard Against Abuses By The National Government, And Promotes Political Accountability.

The most important value promoted by structural federalism is the protection of liberty. *Gregory* v. *Ashcroft*, 501 U.S. 452, 458-459 (1991) ("In the tension between federal and state power lies the promise of liberty"). "The fragmentation of power produced by the

structure of our Government is central to liberty, and when we destroy it, we place liberty at peril." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 707 (2012) (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). Indeed, the Framers considered the structural protections of freedom to be more important than the Constitution's enumeration of protected liberties. *Ibid.*

The liberties protected by our federalism are political and individual. Politically, federalism "allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Bond* v. *United States*, 564 U.S. 211, 221 (2011). Individually, federalism "protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Id.* at 222.

Federalism also preserves the States as autonomous political bodies, "not relegated to the role of mere provinces or political corporations." *Alden* v. *Maine*, 527 U.S. 706, 715 (1999). Hamilton expected state legislatures to be "not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government," and to "constantly have their attention awake to the conduct of the national rulers," making them "ready enough, if anything improper appears, to sound the alarm to the people." The Federalist No. 26, at 172 (Alexander Hamilton) (Clinton Rossiter ed. 1961); see also Akhil Reed

Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1501 (1987) ("At the first sign of a national abuse of power, they could sound a general alarm, communicating information and advice to their constituents and thereby winning their favor.").

"The States are separate and independent sovereigns. Sometimes they have to act like it." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 579 (2012) (Roberts, C.J., joined by Breyer & Kagan, JJ.). States can't, though, if Congress is allowed to command what conduct they must prohibit under state law. "Congress may not treat state legislatures as its puppets; such legislatures are supposed to be autonomous watchdogs, not wholly subservient lapdogs." Paul Brest, Sanford Levinson, Jack M. Balkin, Akhil Reed Amar & Reva B. Siegel, *Processes of Constitutional Decisionmaking* 866 (2015).

Federalism also promotes political accountability. It does so by ensuring that there are "two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States." *United States* v. *Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). If Congress wishes to prohibit the people from exercising their liberty, it must do so itself – openly and directly – rather than by coercing the States to prohibit the people from exercising their liberty. Congress must bear the costs, both the political costs of what might prove to be an unpopular law, *New York* v. *United States*, 505 U.S. 144, 168 (1992) (noting

that if "the Federal Government * * * makes the decision in full view of the public, * * * it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular"), and the monetary enforcement costs of investigation and prosecution. *See Printz* v. *United States*, 521 U.S. 898, 922 (1997) ("The power of the Federal Government would be augmented immeasurably if it were able to impress into its service – and at no cost to itself – the police officers of the 50 States.").[12]

---

[12] Not surprisingly, given the interconnected structure of a liberty-protecting Constitution, a departure from the required federal structure leads to a departure from the required structure of the National Government itself. If Congress were permitted to require a State to criminalize what Congress commanded the States to criminalize, it could not only commandeer state legislatures and conscript state law enforcement officials, but also bypass the President and the President's officers. *Printz* v. *United States*, 521 U.S. 898, 923 (1997) (noting that "the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws"). Allowing Congress to bypass the President and impress the States would eliminate the President's important role in "safeguarding state prerogatives from federal encroachment," through the setting of federal enforcement priorities. Robert A. Mikos, *Indemnification As an Alternative to Nullification*, 76 Mont. L. Rev. 57, 67 (2015); see Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. Rev. 893, 930 (2000) (observing that "the Executive Branch is the best equipped to control federalization" of crime).

Indeed, permitting Congress to command the States to make and enforce law would enable Congress to evade the President's pardon power, the "fail safe" in our criminal justice system. *Herrera* v. *Collins*, 506 U.S. 390, 415 (1993); see *Ex parte Garland*, 71 U.S. 333, 380 (1866) ("This power of the President is not subject

C. A Congressional Command Dictating How A State Must Regulate The Conduct Of Its Citizens Is Unconstitutional, Regardless Of How The Command Is Phrased.

The constitutional limitations upon the power of Congress deprive Congress of "the ability to require the States to govern according to Congress' instructions." *New York* v. *United States*, 505 U.S. 144, 162 (1992). This limitation cannot be evaded by the form or phraseology of Congress's command. Whatever the form or phraseology of the command, the command is still a command.

The following scenarios illustrate why the phraseology or form of a congressional command requiring that States govern according to Congress's instructions has no effect on the constitutional violation.

- **Congressional commands to enact a new law or prohibit expiration of an existing law.** Under *New York* and *Printz*, it's clear that Congress cannot command States to enact a new state law prohibiting conduct that Congress wants prohibited. Similarly, under *New York* and *Printz*, it's clear that Congress cannot prohibit a State from allowing an existing state law to expire by its own

---

to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.").

terms, just as forcing a worker who began his labors voluntarily to continue against his will is still involuntary servitude. Cf. *Bailey* v. *Alabama*, 219 U.S. 219 (1911).

- **Congressional commands prohibiting States from enacting a full or partial repeal of state laws.** A federal law prohibiting "a state from repealing an existing law is no different from forcing it to pass a new one" because "in either case, the state is being forced to regulate conduct that it prefers to leave unregulated." *Conant* v. *Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring). "If the federal government could make it illegal under federal law to remove a state-law penalty, it could then accomplish exactly what the commandeering doctrine prohibits: The federal government could force the state to criminalize behavior it has chosen to make legal." *Ibid.*

That States must have the freedom under PASPA and the Constitution to choose whether to repeal a state law, in whole or in part, is a proposition that both the United States and the Leagues have endorsed. See J.A. 197 (the Solicitor General wrote that "New Jersey is free to repeal those prohibitions in whole or in part"). See also J.A. 181 (the United States argued that under PASPA, it is up to the State of New Jersey "*to determine for itself the extent to which it will or will*

not enforce" its sports betting laws) (emphasis added); Leagues C.A. Br., *Christie I*, Case No. 13-1713, 2013 WL 2904907, at *37 (3d Cir. June 7, 2013) (the Leagues wrote that "[n]oticeably absent from [PASPA's] language * * * is any requirement that states enact, maintain, or enforce anything"); *id.* at *16 (the Leagues argued that "nothing in the unambiguous text of PASPA requires states to keep prohibitions against sports gambling on their books").

If Congress had the power under the Commerce Clause to command States to keep in place any prohibition that a State chooses to repeal, in whole or in part, the core values promoted by our federalism would be significantly undermined. As Dean Chemerinsky explained in the marijuana context, "[t]he federal government cannot command any state government to criminalize marijuana conduct under state law. From that incontrovertible premise flows the conclusion that if states wish to repeal existing marijuana laws *or partially repeal those laws*, they may do so without running afoul of federal preemption." Erwin Chemerinsky *et al.*, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74, 103 (2015) (footnote omitted) (emphasis added).

- **Affirmative or negative phrasing of a congressional command.**

Whether Congress phrases its command to States affirmatively or negatively, the constitutional violation is the same. It is difficult to imagine that *New York* would have been decided differently if Congress, instead of affirmatively commanding the States to take title, had instead phrased its command as a prohibition against States allowing anyone, other than the State itself, to hold title to radioactive waste. In either case the constitutional violation is the same.

It is just as unfathomable that *Printz* would have been decided differently if Congress, instead of affirmatively commanding local law enforcement officials to conduct background checks before issuing gun permits, had instead prohibited States from issuing gun permits without local law enforcement first completing background checks. Again, the resulting constitutional violation is the same.

Indeed, when this Court in *New York* explained that the constitutional principles it was applying "were not innovations," and that "the Constitution has *never* been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions," it relied on its 1911 decision in *Coyle* v. *Smith*, 221 U.S. 559 (1911). *New*

> *York* v. *United States*, 505 U.S. 144, 162 (1992) (emphasis added). *Coyle*, itself, involved a command from Congress to States that was phrased in the negative. In *Coyle*, the Court found unconstitutional an Act of Congress commanding that a state capital "shall *not* be changed." *Coyle*, 221 U.S. at 564 (quoting the statute) (emphasis added).

A distinction resting on the form or phraseology of a congressional command, rather than the unconstitutional consequences of the command, is a distinction without a difference, would gut the principles recognized in *New York*, *Printz*, and *Sebelius*, and allow for easy evasion of the anti-commandeering doctrine. Cf. *Printz*, 521 U.S. at 935 (holding that Congress "cannot circumvent" the prohibition recognized in *New York*). Whether Congress tries to coerce States by prohibiting the removal of state law prohibitions, by prohibiting States from acting, or by prohibiting complete or partial repeals of state laws, Congress has no authority to command a State "to adopt a federal regulatory system as its own." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 578 (2012). "It is the very *principle* of separate state sovereignty that such a law offends." *Printz* v. *United States*, 521 U.S. 898, 932 (1997).[13]

---

[13] As Judge Vanaskie has explained, PASPA is markedly different from constitutionally-permissible exercises of Congressional power seen in cases like *Hodel* v. *Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), and *F.E.R.C.* v. *Mississippi*, 456 U.S. 742 (1982). In those cases, Congress provided that States were free to either regulate the people as Congress

D. As Most Naturally Construed, PASPA Directly Commands States To Prohibit Sports Betting And Is, Therefore, Unconstitutional.

PASPA makes it "unlawful" for a "governmental entity to * * * authorize by law or compact" sports gambling. 28 U.S.C. 3702. It commands the States, under pain of injunctive relief, 28 U.S.C. 3703, not to authorize sports gambling by law.

As a matter of common usage, to "authorize" is to "give permission for," American Heritage Dictionary of the English Language 121 (4th ed. 2000), or to "give official approval to or permission for," Webster's New World Dictionary 92 (3d college ed., 1993). The sixth edition of Black's Law Dictionary similarly defines "authorize" as to "permit a thing to be done in the future."

---

wanted or stand aside and let the national government regulate the people itself. Pet. App. 41a (Vanaskie, J., dissenting) (noting that States "may either comply with the federal legislation *or the Federal Government will carry the legislation into effect*").

Similarly, PASPA is quite unlike *de*regulatory Congressional acts, such as the Airline Deregulation Act involved in *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378-379 (1992), where Congress permissibly provided the people with market freedom and blocked the States from interfering with that freedom. Pet. App. 190a (Vanaskie, J., dissenting) (noting that "if Congress chooses to regulate (or deregulate) directly, it may require states to refrain from enacting their own regulations that, in Congress's judgment, would thwart its policy objectives").

Finally, PASPA is notably distinct from cases like *South Carolina* v. *Baker*, 485 U.S. 505 (1988), and *Reno* v. *Condon*, 528 U.S. 141 (2000), where Congress regulated the States' own activities, not the States' regulation of private parties. Pet. App. 42a-43a (Vanaskie, J., dissenting).

Black's Law Dictionary 133 (6th ed. 1990); see also *ibid.* ("'Authorized' is sometimes construed as equivalent to 'permitted.'"). Since States are commanded by PASPA not to permit sports gambling, then, logically, they are being commanded by PASPA to prohibit it. In so doing, PASPA puts a gun in the hands of private sports organizations, such as the Leagues, granting to them the unfettered discretionary power to target enforcement of PASPA against private parties, such as the NJTHA, sovereign States like New Jersey, or both. See *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 581 (2012) (Roberts, C.J., joined by Breyer & Kagan, JJ.) ("In this case, the financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement' – it is a gun to the head.").

PASPA was conceived and drafted during the brief era when this Court left the protection of state sovereignty to the political process. "State sovereign interests," this Court held in 1985, "are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551 (1985). In dissent, Justice O'Connor lamented the Court's abdication of its constitutional responsibility, and wrote that "the States *as States* have legitimate interests which the National Government is bound to respect." *Id.* at 581 (O'Connor, J., joined by Powell & Rehnquist, JJ., dissenting). Justice O'Connor accurately predicted

that this Court would "in time again assume its constitutional responsibility." *Id.* at 589 (O'Connor, J., joined by Powell & Rehnquist, JJ., dissenting).

Legislative work on PASPA began in the late 1980s. The Senate Judiciary Committee produced its report on PASPA in 1991. See Professional and Amateur Sports Protection Act, S. Rep. No. 248, 102nd Cong., 1st Sess. (1991). The Senate passed PASPA on June 2, 1992, prior to this Court's decision later that month in *New York* v. *United States*.

When Congress passed PASPA,[14] it showed no constitutional scruples about commandeering the States, thereby failing to live up to the trust this Court had placed in Congress in *Garcia*. See *United States* v. *Lopez*, 514 U.S. 549, 577-78 (1995) (Kennedy, J., concurring) (emphasizing that while "it would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance * * * the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon

---

[14] The relevant dates of PASPA's passage are as follows: On June 2, 1992, the Senate considered and passed PASPA. On October 5, 1992, the House considered, amended, and passed PASPA. On October 7, 1992, the Senate concurred in the House amendments. On October 28, 1992, PASPA was approved by the President. The effective date of PASPA is January 1, 1993.

their failure to do so, argue against a complete renunciation of the judicial role").

The primary sponsors of the bill were clear in their belief that they could command States to prohibit sports betting. Senator DeConcini said, "I make no bones about it[.] * * * Except for certain States, sports gaming in amateur and professional sports will be barred. * * * I would like to have it effective *on* all 50 States but that is not in the cards." 138 Cong. Rec. S7274-02, at S7279-80, 1992 WL 116822 (daily ed. June 2, 1992) (statement of Sen. DeConcini) (emphasis added). Senator Bradley explained that PASPA "prohibited" a State "from allowing sports betting." 138 Cong. Rec. S17434-01, at S17435, 1992 WL 275344 (daily ed. Oct. 7, 1992) (statement of Sen. Bradley). Indeed, the formal title of the bill – as opposed to the short title by which the Act "may be cited" according to section 1 of the Act – when first passed by the Senate was "An Act to prohibit sports gambling under State law." S. 474, 102nd Cong., 2d Sess. (as passed by Senate, June 2, 1992). The House later changed the formal title to "An Act to prohibit sports gambling under State law, and for other purposes" (S. 474, 102nd Cong., 2d Sess. (as amended by House, Oct. 5, 1992)), which remained the formal title of the bill when ultimately enacted into law. Pub. L. No. 102-559, 106 Stat. 4227 (1992); see p. 3, *supra*.

Because the most natural construction of PASPA is that it is a direct command to States to prohibit

sports betting, no matter what the people or lawmakers of a State may want, it is obviously unconstitutional under this Court's precedents in *New York* and *Printz*. This was how Judge Vanaskie would have resolved the issue four years ago. He wrote: "By prohibiting states from licensing or authorizing sports gambling, PASPA dictates the manner in which states must regulate interstate commerce and thus contravenes the principles of federalism set forth in *New York* and *Printz*." Pet. App. 187a (Vanaskie, J., dissenting). Time and intervening circumstances have vindicated Judge Vanaskie's straightforward analysis. Pet. App. 35a-36a (Vanaskie, J., dissenting) (noting that his skepticism about the decision in *Christie I* was validated and reiterating, "Because I believe that PASPA was intended to compel the States to prohibit wagering on sporting events, it cannot survive constitutional scrutiny.").[15]

E. The District Court's Injunction Confirms How, In Practice, PASPA Unconstitutionally Commandeers State Legislative And Executive Sovereign Functions.

The en banc majority thought PASPA was "distinguishable from the law at issue in *New York* because it

---

[15] Before this litigation, no one ever suggested that PASPA permitted States (other than the favored exempt States) to allow any amount of sports gambling. It was only when the Leagues sought some way to avoid the otherwise inevitable conclusion of PASPA's unconstitutionality that various other constructions were invented in attempts to save it.

does not require states to take any action." Pet. App. 25a. Quoting from *Christie I*, the en banc majority wrote that "PASPA does not *require* or coerce the states to lift a finger." *Ibid.* This is wrong. The en banc majority fails to take into account the coercive force of the district court's injunction that the en banc majority affirmed.

The district court injunction, obtained at the behest of the Leagues (not the United States), conscripts New Jersey's law enforcement officers to enforce a federal mandate. But the injunction does not enjoin the NJTHA. It only enjoins the State Defendants from "giving operation or effect to the 2014 [Repealer]." Pet. App. 113a; see also *id.* at 92a n.7 ("no injunction is being entered against the NJTHA").

Because the State Defendants are enjoined from "giving operation or effect" to the 2014 Repealer, they must continue to treat New Jersey's repealed sports betting prohibitions as if they are still in full force and effect. If the NJTHA were to begin to offer sports betting at Monmouth Park then it, its members, and the Park's employees would not be in violation of the district court's injunction because none of them are enjoined. Pet. App. 113a; *id.* at 92a n.7. But, all of them would be in violation of every *state* criminal and civil law prohibiting sports gambling, even though all of those laws were repealed at Monmouth Park by the State Legislature.[16]

---

[16] The 2014 Repealer repealed provisions in New Jersey's criminal code (N.J. Stat. Ann. § 2C:37-1 *et seq.*), civil code (N.J.

If Monmouth Park conducted sports betting, the NJTHA members and Monmouth Park employees would be subject to arrest and hauled into *state* court by federally conscripted *state* executive officials, who have been compelled to enforce a federal command by federal injunction, obtained at the behest of the Leagues, to give effect to a repealed state law. And, if the state officials refused to make the arrests required by the federal injunction they would be subject to being hauled into *federal* court by the Leagues for their failure to obey an injunction requiring them to bring the *state* law prosecution under the repealed *state* laws in *state* court.[17]

This is absurd on every level. Yet, this is the reality that has confronted, and continues to confront, the NJTHA. It is a blatant abridgement of liberty. This isn't permissible congressional encouragement. It's impermissible coercion, at least as coercive – if not more so – as what the Court found unconstitutional in *Printz*. As this Court has held, see, *e.g.*, *New York* and *Printz*, the federal government commanding and dragooning state lawmakers and executive branch officers to coerce the people of their State to serve a federal purpose is precisely the kind of federal coercion that

---

Stat. Ann. § 2A:40-1 *et seq.*), and other laws regulating sports betting. Criminal penalties for violating state laws prohibiting sports gambling include incarceration and fines. See pp. 12-13, *supra*.

[17] Would it be contempt for the Governor to issue a pardon or proclaim an amnesty? If so, PASPA would have resulted in eliminating not only the President's pardon power, but the Governor's as well.

the Framers considered, debated, and rejected some 230 years ago.

F. PASPA Significantly Reduces Congress's Political Accountability.

PASPA allows Congress to escape political accountability for its actions, both as to the policies underlying PASPA and PASPA's associated costs. The Congressional Budget Office, for example, estimated that "no cost to the federal government would result from enactment," of PASPA and that it "would not affect direct spending or receipts." S. Rep. No. 248, 102nd Cong., 1st Sess. 10 (1991). As a result, "pay-as-you-go procedures" did not apply. *Ibid.*

If Members of Congress had sought to enact a law making sports gambling a federal crime, rather than commanding the States to keep state criminal laws prohibiting sports gambling in place, they would have had to personally confront the costs of federal investigations and prosecutions. They also would have been accountable to the public for the political fallout from enacting an increasingly unpopular law.[18] Indeed, the en banc majority acknowledged that PASPA is a controversial law, "not without its critics," considered "unwise" by some, and "criticized for encouraging the

---

[18] The Commissioner of the NBA, Adam Silver, has recognized that "[g]ambling has increasingly become a popular and accepted form of entertainment in the United States," and that "some estimate that nearly $400 billion is illegally wagered on sports each year." See J.A. 351.

spread of illegal sports gambling[19] and for making it easier to fix games." Pet. App. 11a. But PASPA allows Congress to escape accountability for its actions and to pass those costs on to the States.

PASPA further distances Congress from any accountability by vesting private organizations, like the Leagues, with the discretionary power to enforce its provisions against whomever the Leagues choose.[20] 28 U.S.C. 3703. So, not only did Congress shift to the States the obligation to prohibit sports betting, it also avoided any federal cost of ensuring compliance with PASPA's provisions by granting authority to the Leagues to seek an injunction to force the States to prohibit sports betting. Cf. *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973) (noting that "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another").

---

[19] Since PASPA's enactment, trillions of dollars have been wagered illegally on sporting events. In 2016 alone, Americans wagered an estimated $154 billion on all sports, nearly all of it through bookies and offshore, illicit web sites. *Super Bowl 51 – By The Numbers*, American Gaming Association (Jan. 31, 2017), https://americangaming.org/research/infographics/super-bowl-51-numbers. In the last Super Bowl alone, $4.7 billion was estimated to be wagered, and approximately 97% of those bets were made illegally. *Ibid.*

[20] Before PASPA became law, the Department of Justice wrote in 1991 that PASPA "raises federalism issues" and that "[i]t is particularly troubling that [PASPA] would permit enforcement of its provisions by sports leagues." Pet. App. 225a.

Vesting the Leagues with the discretionary power to enforce PASPA not only shields Congress from accountability but also poses a danger of arbitrary and unpredictable enforcement. Under Section 3703 of PASPA, the Leagues can pick and choose when they wish to enforce PASPA, and when to turn a blind eye to violations of PASPA. This is exactly what the Leagues have done here.

The United States is not seeking to enforce PASPA against the NJTHA. It's not even a party to this action. Cf. *Alden v. Maine*, 527 U.S. 706, 759-60 (1999) (noting the constitutional difference between an action by the United States and an action brought by a private party and noting that the United States apparently found its interests "insufficient to justify sending even a single attorney * * * to prosecute this litigation").

At the same time as the Leagues have aggressively deployed, under the guise of protecting the integrity of their games and the games of others, their resources to block the NJTHA from conducting sports wagering, they are reaping profits from Fantasy and DFS derived from bets on the performances of players in the Leagues' games and the games of others. The Leagues' full-throated endorsement of Fantasy and DFS demonstrates the pernicious consequences that can follow when Congress tries to avoid political accountability for its actions by granting discretionary enforcement powers to private persons who may have self-interests that are at odds with a statute's, such as PASPA's, purposes. The Leagues, thus, hypocritically stand before this Court profiting from an activity that

PASPA expressly prohibits while at the same time using PASPA to stop the NJTHA from operating a sports betting venue at Monmouth Park that has the potential to save jobs, save the New Jersey equine industry, and preserve open spaces.[21]

G. PASPA Abridges Liberty.

In November, 2011, New Jersey voters, by a margin of 2-1, exercised their political liberty by approving a referendum to amend their state constitution. They exercised their political liberty again to convince the legislature to pass bills in 2012, and yet again in 2014. So far, these exercises of political liberty – reflecting the choices, hopes, wishes, and desires of the people of New Jersey – have been all for naught because of PASPA.

PASPA's commands to New Jersey significantly burden the liberty of everyone associated with Monmouth Park and New Jersey's entire equine industry. If employees at Monmouth Park conduct sports betting, they are at risk of imprisonment and fines for violating state criminal laws prohibiting sports gambling (see pp. 12-13, *supra*), even though the State Legislature has repealed those laws. Moreover, Monmouth Park's employees (everyone from clerks to parking attendants, from table servers to security guards, and from ushers to racing officials) have for years lived under the threat of Monmouth Park closing down because

---

[21] See pp. 9-12, *supra*.

without sports betting, the economic viability of Monmouth Park as a self-sustaining thoroughbred racetrack is in jeopardy. And the choices, hopes, wishes, and desires of the NJTHA's more than 3,000 members to save Monmouth Park and New Jersey's equine industry by establishing a sports betting venue at Monmouth Park have been stonewalled because of PASPA.

H. The En Banc Majority's Construction Of PASPA Is Unreasonable And, In Any Event, Doesn't Save PASPA's Constitutionality.

In attempting to both save the constitutionality of PASPA and hold that New Jersey is prohibited from selectively repealing state law prohibitions against sports gambling, the en banc majority has created an unnatural and illogical construction of PASPA. In any event, the en banc majority's construction does not save PASPA's constitutionality.

1. The en banc majority prefaced its construction of PASPA by saying "we are duty-bound to interpret the text of the law as Congress wrote it," Pet. App. 12a, and cited to the dictionary definition of "authorize." *Id.* at 13a. But the en banc majority also surely recognized that if PASPA prohibits New Jersey from authorizing *any* sports gambling, then it is commanding New Jersey to prohibit sports gambling – an act of Congress that is plainly unconstitutional under *New York*, *Printz*, and *Sebelius*. As a result, the en banc majority did not "interpret the text of the law as Congress wrote

it," but instead radically departed from it and came up with an interpretation that seeks to avoid the constitutional problem. But the en banc majority construction is a most unnatural – and, indeed, an unreasonable – construction. It also fails to avoid the constitutional problem.

The en banc majority reasoned that because the 2014 Repealer does not repeal *all* sports gambling prohibitions, New Jersey thereby authorized by law the sports betting activities that it no longer prohibited. Pet. App. 12a-13a ("[T]he 2014 Law authorizes casinos and racetracks to operate sports gambling while other laws prohibit sports gambling by all other entities. * * * Absent the 2014 Law, New Jersey's myriad laws prohibiting sports gambling would apply to casinos and racetracks."). The en banc majority found there was authorization by law because the State "selectively" lifted its prohibition on sports gambling; such "selectiveness constitutes specific permission and empowerment." *Id.* at 13a. Judge Fuentes described the en banc majority's construction this way: "According to the majority, the 'selective' nature of the 2014 Repeal *amounts to* 'authorizing by law' a sports wagering scheme. That is, because the State retained certain restrictions on sports betting, the majority *infers* the authorization by law." Pet. App. 28a (Fuentes, J., dissenting).

The logical conclusion of the reasoning that selective repeal of some sports gambling prohibitions is an authorization by law under PASPA is that PASPA leaves the States a binary choice of repealing *all* or

none of its prohibitions on sports gambling. Indeed, this is how the district court construed PASPA. See Pet. App. 105a ("In this Court's view * * * PASPA preempts the type of *partial repeal* New Jersey is attempting to accomplish in the 2014 Law, by allowing some, but not all, types of sports wagering in New Jersey, thus creating a label of legitimacy for sports wagering pursuant to a state scheme.").

But the en banc majority declined to follow the district court and declined to follow the logic of its own reasoning to conclude that PASPA gives the States a "strict binary choice between total repeal and keeping a complete ban on their books." Pet. App. 24a. It evidently understood that such a "coercive binary choice" (*id.* at 23a) would also be unconstitutional. It, therefore, accepted what "the Leagues noted at oral argument": that "not all partial repeals are created equal." *Id.* at 24a.

According to the en banc majority, some partial repeals are theoretically so small and allow so little sports gambling that they don't count as authorizations, and therefore don't violate PASPA. Pet. App. 24a ("For instance, a state's partial repeal of a sports wagering ban to allow *de minimis* wagers between friends and family would not have nearly the type of authorizing effect that we find in the 2014 Law."). And some partial repeals are so large and allow so much sports gambling that they are insufficiently selective to count as an authorization, and therefore don't violate PASPA. As the Leagues put it at oral argument before the en banc court, a repeal begins to be large enough

to not constitute an authorization when it allows "around 50%." Oral Argument Before En Banc Third Circuit, *Nat'l Collegiate Athletic Ass'n* v. *Governor of the State of N.J.*, No. 14-4546 (3d Cir. Feb. 17, 2016) at approximately 38 minutes:30 seconds.[22]

Why PASPA is said to exempt sports bets that are *de minimis* or made by those in a familial/friendly relationship is left wholly unexplained. Why PASPA bars state law repeals of *less* than 50% while allowing state law repeals of *more* than 50% is anyone's guess.

The en banc majority's rewrite of PASPA is reminiscent of the proposition that sometimes lawmakers will permissibly seek a "Goldilocks solution – not too large, not too small, but just right." *Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 760 (2011) (Kagan, J., dissenting). But the way in which the en banc majority rewrote PASPA is the inverse of a Goldilocks solution: it would be as if Goldilocks were happy sitting in an oversized chair (such as Edith Ann's rocking chair) or in a teeny chair (such as the ones in Derek Zoolander's children's center), but not in anything between these two extremes.

The en banc majority's rewrite of PASPA does not say where to draw the shifting lines between the amounts or kind of sports betting that is and is not permitted by PASPA. The rewrite provides no principle to

---

[22] A recording of this en banc oral argument can be accessed on the Third Circuit's website. See http://www.ca3.uscourts.gov/oral-argument-recordings. It is the second of the two recordings on the Third Circuit's website for Case No. 14-4546.

guide the line drawing. The en banc majority even confessed that it may not be possible to draw a line separating PASPA compliance by States from non-compliance by States. Pet. App. 24a.

It is difficult to see where a principle would come from to determine what is small enough to be permissible and what is large enough to be permissible under PASPA. But even if such lines could be drawn in a principled way, the en banc majority's construction of PASPA produces the bizarre result that once a State passes the *de minimis* threshold, the *more* a State allows sports gambling, the *closer* it comes to compliance with PASPA. If allowing sports gambling in two of New Jersey's twenty-one counties were found to be too selective and thus on the prohibited side of the PASPA compliance line, allowing it in ten counties would move New Jersey closer to compliance with PASPA; if ten were not enough, allowing it in fifteen would be a step in the compliance direction; if fifteen were not enough, allowing it in twenty might be.

Senators Bradley and DeConcini reluctantly accepted the necessity of exempting States that already allowed sports gambling in order to get the bill passed. They wanted to command every State to prohibit sports betting, including Nevada. Congress, for obvious reasons, was not going to command Nevada to halt sports betting. But under the en banc majority's construction, the more locations where New Jersey allows sports gambling, the closer New Jersey comes to compliance with PASPA.

Is it imaginable that PASPA's sponsors would have supported PASPA if it clearly said what the en banc majority now says PASPA means – that allowing *more* sports betting can move a State *closer* to compliance with PASPA? If a State does not allow *enough* sports betting is it in violation of PASPA? No support for such a statute could come from a reasonable legislator pursuing reasonable ends reasonably.[23] While the en banc majority may have started out with the intent to give PASPA's text a natural construction, it ended up radically departing from the text by rewriting the statute to give it a most unnatural construction.

2. Even if the en banc majority's construction of PASPA was reasonable, it fails to save PASPA's constitutionality for two reasons.

First, Congress simply has no power to tell States that they cannot repeal a state prohibition on private conduct. See *New York*, *Printz*, and *Sebelius*. No matter how little or how much of a state law prohibition on private conduct a State chooses to repeal, Congress cannot command States to prohibit what States don't want to prohibit.

Second, the kind of choice offered by PASPA, as construed by the en banc majority, is itself unconstitutionally coercive. A reasonable federal lawmaker pursuing legitimate ends through legitimate means would not offer States a choice between 1) restricting something the way the federal lawmaker wants it restricted

---

[23] Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

and 2) leaving it very largely *un*restricted – but a federal lawmaker looking to coerce States might make such an offer, because it was an offer that States couldn't refuse.

Imagine if the en banc majority's approach to PASPA were applied to a statute seeking to manage or limit radioactive waste: Congress commands a State to prohibit the possession of radioactive waste by everyone (except the State itself) – but, if the State doesn't want to do that, the State must then allow enough people in enough places in the State to do whatever they want with nuclear waste. Would that statute be constitutional?

Or, imagine the same approach applied to a statute intended to improve gun control: Congress tells a State that it must prohibit the sales of guns unless there is a background check by local law enforcement officials – but, if the State doesn't want to do that, the State must allow enough people in enough places in the State to do whatever they want in connection with the purchase of guns. Would that statute be constitutional?

Or imagine the same approach applied to air and water pollution: Congress tells a State that it must regulate pollution the way Congress dictates – but, if the State doesn't want to do that, the State must allow enough people in enough places in the State to do whatever they want to pollute the air and the water. Would that statute be constitutional?

If States are to remain autonomous sovereigns rather than coerced subjects, the answer to these questions must be no.

II. PASPA May Be Susceptible Of A Reasonable Construction That Does Not Prohibit New Jersey's 2014 Repealer And Avoids The Need To Decide The Constitutional Question.

There is another way to decide this case. This Court can avoid deciding the constitutional question by construing PASPA to allow the States to repeal sports betting prohibitions, in whole or in part. Although construing PASPA this way is not the most natural construction of PASPA, such an approach has been championed by Judge Fuentes, and, at times, advocated by the United States as well as by the Leagues.[24] The Court may determine that PASPA is susceptible of such construction and, if so, it avoids the need to decide the constitutional question.

This Court has long held that in the "prudent exercise" of its jurisdiction, it "will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Bond* v. *United States*, 134 S. Ct. 2077, 2087 (2014) (internal quotation marks and citation omitted); *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). This principle is "sometimes lumped together" with the constitutional-doubt canon, and jointly dubbed the "rules of constitutional avoidance." Antonin Scalia

---

[24] See pp. 27-28, *supra*.

and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 251 (2012).

The constitutional-doubt canon teaches that if "an otherwise acceptable construction of a statute would raise serious constitutional problems," but the statute is "open to a construction that obviates deciding" the constitutional question, the Court will adopt the construction that avoids the constitutional question. *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg.*, 485 U.S. 568, 575, 578 (1988). Thus, "[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (internal quotation marks and citation omitted).

The doctrine of constitutional doubt allows the Court to adopt a construction of a statute that is not the most preferred one but which, nonetheless, is a reasonable one. As Justice Scalia explained:

> "The doctrine of constitutional doubt does not require that the problem-avoiding construction be the *preferable* one – the one the Court would adopt in any event. Such a standard would deprive the doctrine of all function. 'Adopt the interpretation that avoids the constitutional doubt if that is the right one' produces precisely the same result as 'adopt the right interpretation.' Rather, the doctrine of

> constitutional doubt comes into play when the statute is 'susceptible of' the problem-avoiding interpretation, [*United States ex rel. Attorney Gen.* v.] *Delaware & Hudson Co.*, 213 U.S. [366 (1909)] at 408 – when that interpretation is *reasonable*, though not necessarily the best." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 270 (1998) (dissenting opinion).

Feltner v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 358-59 (1998) (Scalia, J., concurring in the judgment).

Apart from the canon of constitutional doubt, a statute "must be read consistent with principles of federalism inherent in our constitutional structure." *Bond* v. *United States*, 134 S. Ct. 2077, 2088 (2014). Congress must speak clearly before this Court will conclude that an Act of Congress has "significantly changed the federal-state balance." *United States* v. *Bass*, 404 U.S. 336, 349 (1971).

"[I]f the Federal Government would radically readjust the balance of state and national authority, those charged with the duty of legislating must be reasonably explicit about it." *Bond*, 134 S. Ct. at 2089 (internal quotation marks and citation omitted); see also *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991) (noting that "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" the "usual constitutional balance of federal and state powers") (internal quotation marks and citation omitted). The clear statement rule "assures that the legislature has in fact faced, and intended to bring

into issue, the critical matters involved in the judicial decision." *Bass*, 404 U.S. at 349.

The decision in *Bond* v. *United States*, 134 S. Ct. 2077 (2014), is illustrative. In *Bond*, this Court, in an opinion for six Justices, held that a federal statute criminalizing the use of chemical weapons did not apply to "an amateur attempt by a jilted wife to injure her husband's lover." *Id.* at 2083. It reached this conclusion even though she used chemicals that "are toxic to humans and, in high enough doses, potentially lethal," and despite an expansive statutory definition that included "[a]ny chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals," other than those used for "peaceful purposes." *Id.* at 2084-85.

Three Justices concluded that the statute was clear, not susceptible of a construction that avoided the constitutional question, and therefore that it was necessary to decide the constitutional question. *Bond*, 134 S. Ct. at 2098 (Scalia, J., joined by Thomas, J., concurring in the judgment) ("Since the Act is clear, the *real* question this case presents is whether the Act is constitutional as applied to petitioner."); *Bond*, 134 S. Ct. at 2111 (Alito, J., concurring in the judgment) (agreeing with Justice Scalia's statutory analysis and "therefore find[ing] it necessary to reach the question whether this statute represents a constitutional exercise of federal power").

The majority in *Bond* believed the statute was not clear and, thus, susceptible of a construction that avoided reaching the constitutional question. As the majority saw it, the disagreement between the six in the majority and their three colleagues concurring in the judgment came down to whether the statute was "utterly clear." *Bond*, 134 S. Ct. at 2093. The three Justices concurring in the judgment found the statute to be "utterly clear." *Id.* at 2096 (Scalia, J., concurring). The majority disagreed. *Id.* at 2093.

This Court may determine that PASPA can reasonably be construed to permit States to repeal some or all of their laws prohibiting sports gambling. This is not the most natural construction of PASPA, but the Court may find it to be a permissible construction.

On this constitutional avoidance construction, nothing in PASPA "requires that the states keep any law in place." Instead, because PASPA speaks not of authorization simpliciter, but of authorization "by law," a State that repeals a state law prohibition has no relevant "law" in place. As a result, the State is not authorizing the formerly-prohibited act "by law." Pet. App. 158a-159a.

When in 2014 the New Jersey Legislature repealed its prohibitions on sports gambling at certain locations, the result, on this view, did not violate PASPA because "with respect to those locations," the "previous prohibitions on sports betting" are "nonexistent," "there are no laws governing sports wagering," and "permission to engage in such an activity is

not affirmatively granted *by virtue of* it being prohibited elsewhere." Pet. App. 28a, 31a (Fuentes, J., dissenting). Under this construction of PASPA, it is false to treat as equivalent (1) a repeal, in whole or in part, and (2) an authorization "by law," because "[t]he right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people." Pet. App. 159a.

There are two additional textual reasons that can support this construction of PASPA. First, PASPA's prohibitions against "licens[ing]" and "authoriz[ation] by law" do not stand alone, but are in a list with "sponsor, operate, advertise, [and] promote." 28 U.S.C. 3702(1). The canon of *noscitur a sociis* "counsels that a word is given more precise content by the neighboring words with which it is associated." *United States* v. *Williams*, 553 U.S. 285, 294 (2008). The words "sponsor, operate, advertise, [and] promote," suggest active state involvement. The Court, therefore, in an effort to avoid deciding the constitutional issue, might conclude that it is reasonable to read "license" and "authorize by law" in PASPA to require a similarly active level of state involvement in sports gambling that does not include repeals, whether in whole or in part.

Second, PASPA prohibits a person from sponsoring operating, advertising, or promoting sports gambling "pursuant to the law or compact of a governmental entity." 28 U.S.C. § 3702(2). Because a person who acts in the absence of any government prohibition would not be described as acting "pursuant to law,"

this provision, too, may suggest that PASPA can be reasonably read as prohibiting active state involvement in sports gambling as opposed to repeals of state law prohibitions, in whole or in part. See Pet. App. 32a (Fuentes, J., dissenting) (finding no violation of PASPA because there is no "sports wagering *pursuant to state law* when there is effectively no law in place as to several locations, no scheme created, and no state involvement").

Unlike the construction by the en banc majority, this constitutional avoidance construction of PASPA does not produce the en banc majority's bizarre result – irreconcilable with any coherent public purpose – that allowing *more* sports betting can move a State *closer* to compliance with PASPA. Instead, PASPA may be construed to mean that a State has the autonomy to repeal as much *or as little* of its state law sports gambling prohibitions as it chooses. And unlike the construction by the en banc majority, this construction is at least rooted in a principle: "[t]he right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people." Pet. App. 159a.

Finally, nothing in the text of PASPA or its legislative history suggests that Congress "in fact faced, and intended to bring into issue," *Bass*, 404 U.S. at 349, whether the National Government has the power to command a State to keep in place *any* part of a state law prohibition that the State wishes to repeal. Certainly, there is no indication that when enacting PASPA, Congress contemplated the possibility that a

State, in the exercise of its sovereign legislative functions, might do what New Jersey has done: repeal its laws against sports gambling in certain locations and strip "all state agencies with jurisdiction over state casinos and racetracks" of "any sports betting oversight."[25] Pet. App. 33a (Fuentes, J., dissenting).

Congress did not contemplate – and therefore did not directly consider – whether it had the constitutional authority to stop a State from simply repealing some of its state law prohibitions against sports gambling. This Court could insist that Congress speak with utter clarity – far more clarity than can be found in PASPA – if it meant to assert such an unprecedented power and effect such a radical shift in federal-state relations.

Under this construction, because PASPA does not prohibit New Jersey's repeal of sports gambling prohibitions at three categories of venues: Atlantic City casinos, current racetracks (such as Monmouth Park) and former racetrack racecourses, there is no need to decide the constitutional question.

* * *

[25] As set forth earlier (at 9), Monmouth Park, through the NJTHA, is the founding member of a private regulatory body called TISWA, which is designed to provide integrity and protect the public with respect to sports betting. J.A. 226 ¶7; J.A. 148-152.

Either PASPA allows States to repeal their sports betting prohibitions in whole or in part, or it is unconstitutional. Either way, New Jersey's 2014 Repealer is valid.

CONCLUSION

The judgment of the court of appeals should be reversed, with instructions to vacate the injunction and dismiss the complaint.

Respectfully submitted,

RONALD J. RICCIO
ELIOTT BERMAN
MCELROY, DEUTSCH, MULVANEY
& CARPENTER, LLP
1300 Mount Kemble Avenue
Morristown, New Jersey 07962

EDWARD A. HARTNETT
Richard J. Hughes Professor of Law
SETON HALL UNIVERSITY
SCHOOL OF LAW
One Newark Center
1109 Raymond Boulevard
Newark, New Jersey 07102

Counsel for Petitioner
New Jersey Thoroughbred
Horsemen's Association, Inc.

August 29, 2017

No. 16-477

In The Supreme Court of the United States

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,

Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NATIONAL BASKETBALL ASSOCIATION, NATIONAL FOOTBALL LEAGUE, NATIONAL HOCKEY LEAGUE, OFFICE OF THE COMMISSIONER OF BASEBALL, doing business as MAJOR LEAGUE BASEBALL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR THE PETITIONER

EDWARD A. HARTNETT
Richard J. Hughes Professor of Law
SETON HALL UNIVERSITY SCHOOL OF LAW
One Newark Center
1109 Raymond Boulevard
Newark, New Jersey 07102
(973) 642-8842

RONALD J. RICCIO
Counsel of Record
ELIOTT BERMAN
McELROY, DEUTSCH, MULVANEY & CARPENTER, LLP
1300 Mount Kemble Avenue
Morristown, New Jersey 07962
(973) 993-8100
rriccio@mdmc-law.com

Counsel for Petitioner New Jersey Thoroughbred Horsemen's Association, Inc.

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM